4)

OCT 31 197
MICHAEL ROD JR. CLK

IN THE

# Supreme Court of the United States

OCTOBER TERM 1971

No. 71-5685

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually and on behalf of their minor children and on behalf of all others similarly situated,

*Plaintiffs-Appellants,*

v.

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

*Defendants-Appellees.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF OF ~~APPELLANTS~~ PETITIONERS

CARL JAY NATHANSON
Nassau County Law Services Committee, Inc.
285 Fulton Avenue
Hempstead, New York 11550
(516) 292-8100

*Attorney for Appellants*

Washington, D.C. • THIEL PRESS • (202) 393-0625

# TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | i |
| PRELIMINARY STATEMENT | 1 |
| A. Events Since the Granting of Certiorari | 1 |
| ARGUMENT: | |
| The Case Is Not Moot and Declaratory and Injunctive Relief Is Appropriate | 3 |
| A. The Reasonable Expectation That the Wrong Will Be Repeated | 3 |
| B. The Public Interest in Having the Question of Law Settled | 5 |
| C. The State's New Evidence | 7 |
| CONCLUSION | 10 |
| APPENDIX A | 1a |


## TABLE OF AUTHORITIES

*Cases cited:*


*Boggess v. Berry Corporation*, 233 F.2d 389 (9th Cir. 1956) ..... 6

*Bono v. United States*, 113 F.2d 724 (2nd Cir. 1940) ..... 7

*Dunn v. Blumstein*, 405 U.S. 330 (1972) ..... 6

*Evers v. Dwyer*, 358 U.S. 202 (1958) ..... 8

*Gardner v. Toilet Goods Asso.*, 387 U.S. 167 (1967) ..... 8

*Golden v. Zwickler*, 394 U.S. 103 (1969) ..... 4

*Gray v. Sanders*, 372 U.S. 368 (1963) ..... 3,4

*Ihrke v. Northern States Power Company*, 459 F.2d 566 (8th Cir. 1972) ..... 7

In Re *Frank Fehr Brewing Co.*, 268 F.2d 170 (6th Cir. 1959) ..... 7

*Mitchell v. Overman*, 103 U.S. 63 (1880) ..... 5

*Moore v. Ogilvie*, 394 U.S. 814 (1969) ..... 3,4

*Parker v. Ellis*, 362 U.S. 574 (1960) ..... 5

*Schley v. Pullman's Palace Car Co.*, 120 U.S. 575 (1887) ..... 7

*Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498 (1911) ..... 3

*United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897) ..... 6

*United States v. W. T. Grant Co.*, 345 U.S. 629 (1953) ..... 3,5,6

*Virginian Ry. Co. v. Systems Federation No. 4*, 300 U.S. 515 (1937) ..... 6

*Other Authorities Cited:*

*Newsday*, February 23, 1971, p. 24 ..... 4

United States Department of Commerce, Bureau of Census, *General Social & Economic Characteristics–New York*, 1970 Census ..... 4

IN THE

# Supreme Court of the United States

OCTOBER TERM 1971

---

No. 71-5685

---

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually and on behalf of their minor children and on behalf of all others similarly situated,

*Plaintiffs-Appellants,*

v.

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

*Defendants-Appellees.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## REPLY BRIEF OF APPELLANTS

---

## PRELIMINARY STATEMENT

### A. Events Since the Granting of Certiorari

The local school board informs the Court that the district voters, "after consistent budget rejection, finally

approved their school district budget on May 3, 1972," and textbooks are being provided free during the current school term to students in grades 1-6. This recent development, however, must be viewed in (1) the context of the district's voting pattern during the last three school years when six of seven school budgets were defeated;[1] (2) the local school board's continued admission that in the event of budget rejection they are "without power and authority to furnish textbooks free to pupils enrolled in grades one to six," [Board's Brief, p. 4]; and, (3) the requirement pursuant to §1716 of the New York Education Law that there be annual budget referenda.

Appellee State argues that the recent voter action renders the appeal moot. Additionally, it seeks to advance "evidence" not a part of the record. This Reply Brief is limited to analyzing the State's argument and to establishing that the action remains a continuing controversy appropriate for resolution of this Court.

---

[1]Significantly, the action by the voters in the local district has not signalled the end of the statewide trend toward continued budget rejection. Mr. Louis DiGuilio, Assistant, Bureau of School Business Management, New York State Education Department, Albany, New York, stated in a telephone conversation, on September 22, 1972 that during the current school year 28 school districts have defeated budget.

## ARGUMENT

### THE CASE IS NOT MOOT AND DECLARATORY AND INJUNCTIVE RELIEF IS APPROPRIATE

#### A. The Reasonable Expectation that the Wrong Will Be Repeated.

The most recent action of the voters has not rendered this case moot. The pattern of consistent budget rejection is documented by the record before this Court. [App. 45, 60]. The challenged legislative scheme for distributing textbooks to grades 1-6 remains in force. These facts, considered together with the local Board's admission that absent voter approval of a budget the Board is "without power and authority to furnish textbooks free to pupils enrolled in grades one to six," [App. pp. 35, 41] establish, at a minimum, a "reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953); *Gray v. Sanders*, 372 U.S. 368, 375-376 (1963). Moreover, a mootness finding would shield the challenged practice from scrutiny; it would be "capable of repetition, yet evading review." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), quoting *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911).

In *Gray v. Sanders* and *Moore v. Olgive, supra*, this Court reached the merits in election law challenges despite the completion, prior to the Court's action, of the particular elections giving rise to the cases. In *Gray*, the Court noted that the challenged law "remain[ed] in force; and . . . would govern future elections" and that "the practice [was] deeply rooted and longstanding." 372 U.S. at 376. Similarly, in *Moore*, the Court observed that the contested provision "remains and controls future elections. . . ." 394 U.S. at 816. In each case, this Court

characterized the complaint as seeking "declaratory relief" and, in effect, declared the rights of the parties. *Gray, supra*, 372 U.S. at 370, 376-381; *Moore, supra*, 394 U.S. at 815, 818-819.

*Gray* and *Moore* establish the propriety of injunctive and declaratory relief in the case now before the Court. There will be annual budget referenda[2] and given the recent voting pattern and the local district's admission of its obligations under the challenged state law, the fee requirement may properly be viewed as "deeply rooted and longstanding." Furthermore, since plaintiffs sued, pursuant to Rule 23, on behalf of a class of poor persons with children in grades 1-6, [App. at 8] it is apparent that those involved will be affected by future budget rejections.[3]

The State argues that declaratory relief is inappropriate, citing general language from several cases. [State's Brief, pp. 18-19]. But the cases cited establish only that there is no litmus paper test; the particular facts of each case must control the Court's determination. Here as we have shown, a decision on the merits is warranted.[4]

---

[2]In contrast *Moore* involved presidential elections occurring only every four years. 394 U.S. at 815.

[3]The Nassau County Department of Social Services reports that there are 898 individuals receiving public assistance in the West Hempstead school district. *Newsday*, February 23, 1971, p. 24. According to the U.S. Bureau of Census, more than 5% of the families in the school district have annual incomes below $3,999. United States Department of Commerce, *General Social and Economic Characteristics–New York*, 1970 Census.

[4]The weakness of the State's argument emerges from a more detailed consideration of *Golden v. Zwickler*, 394 U.S. 103 (1969), one of the cited cases. In *Golden*, alleging a desire to distribute anonymous leaflets directed at a particular Congressman, plaintiff

Appellants have diligently pursued their constitutional challenge to the statutory scheme in the Courts. Nevertheless, judicial resolution of the controversy has spanned three school years. It is a deep-rooted principle of law that, "where the delay in rendering a judgment or decree arises from the act of the Court, that is, where the delay has been caused either for its convenience or by the multiplicity or press of business either by the intricacy of the question involved or any other cause not attributable to the laches of the parties, the judgment or decree in the interest of justice, may be entered retrospectively as of the time when it should or might have been entered up." Mr. Justice Douglas, dissenting in *Parker v. Ellis*, 362 U.S. 574, 599 (1960) quoting *Mitchell v. Overman*, 103 U.S. 63, 64-65 (1880).

### B. The Public Interest in Having the Question of Law Settled.

Where, as appellants have demonstrated, there is a reasonable expectation that the wrong will be repeated coupled with a public interest in having the legality of the practices settled, this Court has recognized an exception to the mootness doctrine.[5] *United States v. W. T. Grant*,

---

challenged a New York law forbidding unsigned materials. In ruling that declaratory relief was inappropriate, this Court noted that the Congressman had become a State Court Judge, a position with a 14 year term. 394 U.S. at 109 and n. 4. Thus, in the Court's words, it was "most unlikely that the Congressman would again be a candidate for Congress. . . ." 394 U.S. at 109. There is no basis for a similar statement in this case.

[5]One measure of the importance of the question presented is the fact that during the preceding five years, 1967-1971, the taxpayers in New York State rejected 497 of the 3610 school budgets. In two of the years, 1969 and 1971, the voter rejection rate was approximately 20 per cent. A. Buell Arnold, Director,

*Co., supra*, 345 U.S. at 623-633; *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 309-310 (1897).

Recently, this Court in *Dunn v. Blumstein*, 405 U.S. 330, n. 2 at 333 (1972) decided a case involving residency requirements for voting in the State of Tennessee. In that case, Justice Marshall observed as follows:

> "The District Court properly rejected the State's position that the alleged invalidity of the three-month requirement had been rendered moot, and the State does not pursue any mootness argument here. Although appellees now can vote, the problem to voters posed by the Tennessee residency requirements is 'capable of repetition, yet evading review.' "

"Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937).

In *Boggess v. Berry Corporation*, 233 F.2d 389, 391 [9th Cir. 1965], the Ninth Circuit stated:

> "Where, however, interest of a public character are involved under conditions that may immediately be repeated, thus giving the litigation a continuing character, . . . the mere fact that the particular

---

Division of Educational Management Services, New York State Education Department, Albany, New York, Memorandum, Budget Defeat Information, November 3, 1971; Mr. Arthur Jones, Supervisor, Division of Educational Management Services, New York State Education Department, Albany, New York, telephone conversation October 2, 1972.

subject matter of the instant cause has expired does not render the case moot."

Thus, where recurring questions of public interest are involved, "federal courts have recognized an exception to the mootness doctrine." *Ihrke v. Northern States Power Company*, 459 F.2d 566, 571 [8th Cir. 1972].

### C. The State's New "Evidence"

The State attempts, through its Brief, to introduce "evidence" at the appellate level. This attempt to supplement the record nearly two years after the commencement of the action is not only improper,[6] but totally without merit. Without citation to the appendix agreed upon for use in this Court or any documentation, the State asserts that:

> "at the commencement of this action, counsel for the respondent Board of Education informed the Court and counsel for all parties that surplus textbooks were available in stock from preceding years, and that these books were being furnished free to petitioners' minor children." [State's Brief, p. 7].

The statement is baseless. The local school Board, both in its answer and in affidavits filed in the District Court on October 10, 1971, admitted that textbooks were denied students whose parents were unable to pay the fee. [App. 7, 34, 41]. The State filed neither an answer

---

[6] As far back as 1887 this Court in *Schley v. Pullman's Palace Car Co.*, 120 U.S. 575, held that on appeal it is the record alone and not facts advanced in the briefs which may be given effect. See, too, *Bono v. United States*, 113 F.2d 724 [2nd Cir. 1940]. "Factual statements contained in the party's brief are not a part of the record." *In re Frank Fehr Brewing Co.*, 268 F.2d 170, 183 (6th Cir. 1959).

nor any affidavits in the District Court, the appropriate means by which to controvert allegations. Instead, the State moved to dismiss the complaint, thereby conceding the factual allegations made by the plaintiffs and the admissions of the local school board. See, *e.g. Gardner v. Toilet Goods Association*, 387 U.S. 167, 172 (1967). It is also significant that the State's assertion was not made in any of its four previous briefs, nor in its argument before the Court of Appeals.[7]

---

[7]For information of this Court, the following did occur:

The 1970-71 school term began in the local district on September 9, 1970. As alleged by plaintiff [App. at 7, 22, 24, 26] and admitted by the local school board [App. at 34] those children whose parents could not pay the rental fee were denied textbooks. For more than four weeks, plaintiffs' children and other children unable to afford the fees were forced to attend school without the required textbooks. After the final hearing before the District Court on October 6, 1970, at which time preliminary relief was denied, counsel for both the local board and plaintiffs, out of mutual concern to limit the educational and psychological harm being visited upon plaintiffs' children, agreed, out-of-court, that plaintiffs' counsel would deposit $30 with counsel for the board, and the board would in turn issue textbooks to the named plaintiffs' children. It was agreed that the deposit would be made and accepted without prejudice to the rights of either party in the pending litigation. At the start of the 1971-72 school term, the local district continued adherence to the policy of denying textbooks to children whose parents could not pay rental fees. Mrs. Rosemary Imbergamo's daughter, Lisa, attending first grade, was denied textbooks for a substantial portion of the 1971/72 term. See affidavit appended to this brief. Mrs. Imbergamo is a member of the class represented by plaintiffs. [App. at 8]. In *Evers v. Dwyer*, 358 U.S. 202, 203-204 (1958), this Court held that the appellant who had boarded the bus for the purpose of challenging a state law segregating passengers, but who left the bus when threatened with arrest, demonstrated the existence of an actual controversy. Just as continuing to ride the buses was not required in *Evers*, neither should appellants' children be required to continue attending school without textbooks to demonstrate the existence of an actual controversy.

Furthermore, the Attorney General appends to his Brief a letter from the Counsel and Deputy Commissioner of Legal Affairs for the Appellee State Education Department. [Appendix A., State's Brief at 21]. The substance of this letter, written nearly two years after the action was commenced, appears to be that when a budget is defeated a district may: (1) distribute free any books already on hand, and, (2) limit its charge to parents to each student's pro-rata share of the cost of additional books. If no additional books are needed, existing stocks must be loaned free. [State's Brief at 21-22].

There is nothing in the record before this Court upon which to conclude that the procedures outlined by the State in Appendix A were not followed by the local district. It would appear that the $7.50 fee may well have been required despite the utilization of the procedures outlined. According to counsel for the local school district, textbooks must be replaced every five years. The $7.50 fee charged in 1970-71 and 1971-72, therefore, represents each student's pro-rata share of the cost of replacing a portion of the total stock of texts. What impact, if any, the State's contention has on the case before this Court is speculative. There is nothing in the record to justify attaching any weight to the State's Appendix.

## CONCLUSION

The controversy is not moot and Appellants have demonstrated the appropriateness of injunctive and declaratory relief.

Respectfully submitted,

CARL JAY NATHANSON
Nassau County Law Services
Committee, Inc.
285 Fulton Avenue
Hempstead, N.Y. 11550
(516) 292-8100
*Attorney for Appellants*

October 3, 1972

## APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually and on behalf of their minor children and on behalf of all others similarly situated,

*Plaintiffs-Appellants*

-against-

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

*Defendants-Appellees*

AFFIDAVIT

STATE OF NEW YORK )
) SS.:
COUNTY OF NASSAU )

ROSEMARY IMBERGAMO, being duly sworn, deposes and says:

I reside at 590 Park Avenue, West Hempstead, New York, together with my two children, Lisa, age 7, and James, age 5.

Lisa is presently attending the second grade at the Delaney School in the West Hempstead Public School District.

During the 1970-71 school year, Lisa attended kindergarten in the same school. Last year Lisa attended the first grade.

At the start of the 1971-72 school term, I was notified by the West Hempstead Public School District that I would have to pay a rental fee of $17.50 to obtain textbooks for Lisa.

I was at that time, and still am, a recipient of public assistance from the Nassau County Department of Social Services. I was, therefore, unable to pay the rental fees, and consequently, Lisa went without textbooks from the start of school early in September until approximately November, 1971, at which time the district provided Lisa with textbooks for the remainder of the school term.

I have received a bill from the district in the sum of $17.50 for the textbooks furnished to Lisa last term, but I have been unable to pay the rental fee demanded.

/s/ Rosemary Imbergamo

Sworn to before me this
27th day of September, 1972
/s/ Cecille Kaden

CECILLE KADEN
Norary Public, State of New York
No. 20-2013750
Qualified in Nassau County
Commission Expires March 30, 1973